

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ATLANTIC SERVICES, INC.	:	DETERMINATION
AND	:	DTA NOS. 819556
CHERIE D. TRIPOLI	:	AND 819557
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1996 through November 30, 2001.	:	

Petitioners, Atlantic Services, Inc. and Cherie D. Tripoli, 373 Hartford Road, Amherst, New York 14226, each filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1996 through November 30, 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on July 26, 2004 at 9:15 A.M. Petitioner Cherie Tripoli appeared *pro se* and also for Atlantic Services, Inc., as its president. The Division of Taxation appeared by Mark F. Volk, Esq. (Nate' L. Juntunen and Harry D. Vandermeulen).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly determined the amount of sales and use taxes owed by petitioner Atlantic Services, Inc. for the period March 1, 1996 through November 30, 2001.

FINDINGS OF FACT

1. Petitioner Atlantic Services, Inc. (“Atlantic”) was incorporated in New York State on January 4, 1996, and its primary business activities included window cleaning, power washing and some maintenance work. Petitioner Cherie Tripoli was president of Atlantic and the owner of all 200 shares of outstanding stock. At the small claims hearing held herein, petitioner Cherie Tripoli conceded that as an officer and person responsible for the financial affairs of Atlantic she was personally liable for any taxes owed by the corporation.

2. During the course of an audit of an unrelated taxpayer the Division of Taxation (“Division”) came across a sales invoice issued by Atlantic to one of its customers. A review of the Division’s records revealed that Atlantic was not a registered vendor for sales and use tax purposes and had not filed any sales and use tax returns since its inception in 1996. Accordingly, in early 2002 the Division commenced a field audit of Atlantic’s books and records to determine if any sales and use taxes were due for the period March 1, 1996 through November 30, 2001.

3. There is no dispute that Atlantic failed to provide adequate books and records for audit. The only records made available for audit were income tax returns and some bank statements. Using bank deposit information and gross receipts from Federal tax returns for those months where bank deposit information was not available, the Division determined that Atlantic’s gross

sales totaled \$296,219.63 for the audit period. Since no sales invoices or other sales records were produced, the Division concluded that all sales were taxable and computed a tax due thereon of \$23,697.62.

4. On July 26, 2002, the Division issued a Notice of Determination to Atlantic assessing sales tax due of \$23,697.62, plus penalties and statutory interest. On September 30, 2002, the Division issued a Notice of Determination to petitioner Cherie Tripoli indicating that as an “officer/responsible person” of Atlantic she was personally liable for payment of the \$23,697.62 due from Atlantic, plus penalties and statutory interest. As noted previously, petitioner Cherie Tripoli concedes that she is personally liable for any taxes due from Atlantic and therefore this issue will not be addressed hereinafter.

5. Both of the above referenced notices of determination were timely protested with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). As the result of a conciliation conference, BCMS issued separate conciliation orders on May 30, 2003 wherein the additional tax due asserted in each notice of determination was reduced by \$3,589.84, to \$20,107.78. The additional tax due was modified as the result of the reduction of audited taxable sales by \$44,873.00 for “exempt contracts.”

6. At the hearing held on July 26, 2004 the Division stipulated to the cancellation of all penalties and the reduction of interest from statutory rates to minimum rates.

SUMMARY OF PETITIONERS’ POSITION

7. Petitioners assert that it is unfair and inequitable for the audit period to go back almost six years to March 1, 1996 when it first commenced business operations. Petitioners utilized the services of a licensed attorney when the business was formed, and Ms. Tripoli was under the

impression that all registrations, licenses and notifications were filed by said attorney.

Furthermore, an accountant was engaged to prepare corporation franchise tax returns and income tax returns and no mention was ever made by the accountant of the need for Atlantic to register with the Division as a vendor for sales tax purposes and that it was required to collect and remit sales tax. Ms. Tripoli argues that this was her first attempt at owning and running a business; that she was unsophisticated in tax matters; that she relied on the attorney and accountant with respect to tax matters and, finally, that she has little or no funds to pay this liability.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law §1147(b) provides that “no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time.” Since Atlantic failed to file any sales tax returns for the entire period at issue herein, the statute of limitations for assessment was not triggered and the Division was free to issue an assessment at any time. While it may seem harsh to petitioners for the Division to be able to assess sales and use taxes due going back to the date business operations commenced, it must be recognized that it was Atlantic’s responsibility to (i) register as a vendor for sales and use tax purposes; (ii) collect the proper sales tax due on taxable sales; and (iii) file a timely return with the remittance of the correct tax due. By failing to file sales tax returns, petitioners have exposed themselves to the assessment of sales and use taxes due at any time.

B. The record herein contains no credible evidence to show that the revised additional tax due, as determined by the conciliation orders dated May 30, 2003, was in any manner incorrect or overstated and therefore the Division’s assessment of tax due in the amount of \$20,107.78

must be sustained. The Division has stipulated, however, to the cancellation of penalties and the reduction of interest from statutory rates to minimum rates.

C. The petitions of Atlantic Services, Inc. and Cherie D. Tripoli are granted solely to the extent that all penalties are canceled and interest is reduced from statutory rates to minimum rates, and the notices of determination dated July 26, 2002 and September 30, 2002 are, except as modified by the conciliation orders and this determination, in all other respects sustained.

DATED: Troy, New York
October 7, 2004

/s/ James Hoefer
PRESIDING OFFICER